

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT PERRYMAN,

Defendant and Appellant.

B267554

(Los Angeles County
Super. Ct. No. BA398438)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Roberta L. Davis and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Albert Perryman appeals from his judgment of conviction of attempted willful, premeditated, and deliberate murder (Pen. Code,¹ §§ 664, 187, subd. (a)) and assault with a firearm (§ 245, subd. (a)), with true findings on various firearm enhancement allegations (§§ 12022.5, subd. (a), 12022.53, subds. (b)-(d). On appeal, Perryman contends that the evidence was insufficient to support his conviction for attempted murder and the firearm enhancements. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Charges

In an amended information, the Los Angeles District Attorney charged Perryman with one count of attempted willful, premeditated, and deliberate murder (§§ 664, 187, subd. (a)) and one count of assault with a firearm (§ 245, subd. (a)). On the attempted murder count, it was alleged that Perryman personally and intentionally discharged a handgun within the meaning of section 12022.53, subdivisions (b) through (d). On the assault with a firearm count, it was alleged that Perryman personally used a handgun within the meaning of section 12022.5, subdivision (a). It also was alleged that Perryman had three prior serious or violent felony convictions (§§ 667, subds. (a)-(i), 1170.12, subds. (a)-(d)), and had served one prior prison term (§ 667.5, subd.(b)). Perryman pled not guilty to each count and denied the enhancement allegations.

¹ All further statutory references are to the Penal Code.

II. Prosecution Evidence

Eddie Reed, the victim in this case, lived in the back house of a residence located on West 71st Street in Los Angeles. Virgil Collins lived in the front house, and his sister, Sherry Tolbert, visited Collins at that location from time to time. Tolbert was involved in a casual sexual relationship with Perryman, and she sometimes brought Perryman with her to the 71st Street residence to visit Collins. Tolbert also allowed Perryman to park his Mercedes in the driveway of the residence. Reed had known Perryman for a number of years because they grew up in the same neighborhood. Reed, Collins, and Tolbert were drug users.

On March 24, 2012, Perryman and Reed had a dispute over money. Perryman had given Reed a large counterfeit bill to cash, which Reed later tried to return. During an altercation in front of the 71st Street residence, Perryman hit Reed in the face multiple times. Perryman also proclaimed that the location was his “hood” and invoked the name of the “Crips.” Perryman told Reed to leave the premises and never return. Reed left the area, but returned a short time later because he had lost his cell phone. Perryman told Reed his cell phone was not there. Perryman also repeated his command that Reed leave and never return.

Later that night, Reed again returned to the 71st Street residence. At that time, he was driving a black Honda that had been reported stolen. While Reed was inside the vehicle and stopped in front of the residence, Perryman approached, fired a handgun, and shot Reed in the face. Reed drove a short distance down the street before losing consciousness and crashing into two parked vehicles.

At trial, several witnesses were called to testify about the shooting. Collins testified that he was alone in the front house

when the shooting occurred. According to Collins, Reed came to the house that night and began banging on the walls. Reed also shouted in a threatening manner, “Come out. Come out. I know you’re in there.” Collins then heard the sound of gunfire followed by a car crash. He decided to call 911 at that time because he believed Reed was shooting at the house. However, in an interview with the police shortly after the shooting, Collins told a different version of events. Collins stated that both Perryman and Tolbert were with him inside the front house when Reed pulled up in a car and shouted at Perryman to come out. After Perryman went outside, Collins heard gunfire and a car crash and then saw Perryman running down the street. Collins also told the officers that he was afraid Perryman was “going to do something” to him for cooperating with the police.

Giovanni Melchor was standing across the street from the 71st Street residence at the time of the shooting. At trial, Melchor testified that he did not witness the shooting. He only saw a dark Honda swerve from side to side and then crash into two vehicles parked on the street. In an interview with the police at the scene, however, Melchor stated that he saw a Black man exit the 71st Street residence, produce a handgun, and fire two shots at a vehicle. The shooter then ran from the area. Melchor also identified the shooter as the person who owned the Mercedes that was parked in the driveway of the residence. During his interview with the police, Melchor was initially reluctant to make a statement because he feared retaliation from gang members in the neighborhood.

Tolbert testified that she and Perryman were in her van on the night of the shooting. Tolbert was driving and Perryman was in the passenger seat. While driving along 71st Street, Tolbert

and Perryman passed by Reed, who was in a black Honda, and Perryman yelled at Tolbert to stop her vehicle. Perryman then jumped out of the van and ran down the street toward Reed. At trial, Tolbert denied any other knowledge about the shooting. In an interview with the police, however, Tolbert stated that, after Perryman exited her van and ran toward Reed, she heard a gunshot. Tolbert then looked in her rearview mirror and saw Reed's car crash into another vehicle. Tolbert also told the police that she picked up Perryman shortly after the shooting, and at that time, Perryman said that he thought he had shot Reed. Tolbert was very reluctant to speak to the police during the interview and related that she was afraid of Perryman.

When the police arrived at the scene of the shooting, they found Reed unconscious in the driver's seat of the Honda. He had sustained a single gunshot wound to his head. A machete was found on the front passenger floorboard of the vehicle. No other weapons were recovered at the scene. Reed testified that the machete did not belong to him, and he did not know who owned any of the items inside the Honda because he had borrowed the car from someone else.

Due to the severity of his head injury, Reed could not recall many details of the shooting at trial. He denied, however, that he went to the 71st Street residence on the night of the shooting to confront Perryman. Reed stated that he did not know Perryman would be at the residence at that time, and that he only wanted to retrieve his belongings from the back house. Reed further testified that he did not recall exchanging any words with Perryman before the shooting occurred.

III. Defense Evidence

Perryman testified on his own behalf at trial. According to Perryman, he had known Reed for over 40 years and considered Reed to be his friend. On the day of the shooting, Perryman and Reed had a dispute over a counterfeit \$100 bill. Reed slapped Perryman, and in response, Perryman hit Reed twice in the face. Reed then pulled a knife from his pocket. Perryman had a gun on his person at the time but did not display it. Instead, he told Reed to leave the premises and Reed complied. A short time later, Reed returned to the residence and aggressively demanded his cell phone. After Perryman assured Reed that he did not have the cell phone, Reed again left the area. Perryman gave his gun to his nephew in case the police came to investigate his altercation with Reed. Later that night, Perryman retrieved his gun from his nephew's home and placed it in the pocket of his sweatshirt.

As Perryman was walking back to the 71st Street residence, Tolbert drove by and told Perryman to get in her van. Tolbert said that Collins had called her to report that Reed was "banging all on the house." When Tolbert and Perryman arrived at the residence, Perryman saw Reed coming out of the front yard. Perryman got out of the van and approached Reed, who had stopped by a parked car. Perryman placed his hands in his sweatshirt pockets and asked Reed, "What's going on, man. I thought it was over with." In response, Reed told Perryman, "You got me fucked up. I'm going to show your mother fucking ass." Perryman walked toward the back of Reed's car and stood about four to five feet from the rear bumper. Reed appeared to be agitated as he continued talking to Perryman.

Reed got into the car and turned on the ignition, but did not drive away. Instead, Reed leaned toward the front passenger area of the car and then abruptly opened the driver's side door. Perryman had his finger on the trigger of the gun inside his pocket and was standing about 16 feet from Reed. When the driver's door opened, Perryman saw an object that looked like a barrel in Reed's hand. In response, Perryman flinched and the gun in his pocket accidentally discharged. Perryman then saw Reed's car drive off and crash into other vehicles on the street. Perryman immediately left the area because he was afraid. A few minutes later, Perryman got back into Tolbert's van and told her, "I think I accidentally shot Ed." Tolbert drove Perryman to his cousin's house and Perryman gave the gun to his cousin. Perryman did not check on Reed's condition before fleeing nor did he report the shooting to the police.

IV. Verdict and Sentencing

The jury found Perryman guilty as charged of attempted willful, premeditated, and deliberate murder and assault with a firearm. The jury also made true findings on each of the firearm enhancement allegations. Following the jury's verdict, Perryman was sentenced to an aggregate term of 77 years to life in state prison.

DISCUSSION

On appeal, Perryman challenges the sufficiency of evidence supporting his conviction for attempted willful, premeditated, and deliberate murder and the true findings on the firearm enhancement allegations. Perryman specifically contends the evidence was insufficient to support a finding that, when he

discharged his gun, he acted with a specific intent to kill or with premeditation and deliberation. Perryman claims the evidence instead established that the shooting of Reed was accidental.

I. Relevant Law

In evaluating a claim of insufficient evidence in a criminal case, “we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict - i.e., evidence that is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict. [Citation.]’ (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

“Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward

accomplishing the intended killing. [Citation.]” (*People v. Ervine* (2009) 47 Cal.4th 745, 785.) “Although motive is often probative of an intent to kill, the absence of a clear motive does not demonstrate the lack of an intent to kill.” (*People v. Houston* (2012) 54 Cal.4th 1186, 1218.) As the California Supreme Court has explained, “[t]here is rarely direct evidence of a defendant’s intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant’s actions. [Citation.] The act of firing toward a victim at a close, but not point blank, range “in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill. . . .” [Citation.]’ [Citations.]” (*People v. Smith* (2005) 37 Cal.4th 733, 741.)

An attempted murder is “premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.” (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) “Premeditation and deliberation do not require an extended period of time, merely an opportunity for reflection.” (*People v. Cook* (2006) 39 Cal.4th 566, 603.) Indeed, “[t]he true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .’ [Citations.]”” (*People v. Watkins* (2012) 55 Cal.4th 999, 1026.) “Generally, there are three categories of evidence that are sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method. [Citations.] . . . But these categories of evidence . . . “are descriptive, not normative.” [Citation.] They are simply an “aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of

considerations rather than mere unconsidered or rash impulse.” [Citation.]” (*People v. Elliot* (2005) 37 Cal.4th 453, 470-471.)

A defendant who commits an attempted murder may also be subject to sentence enhancements for personally using or intentionally discharging a firearm in the commission of the offense. (§§ 12022.5, subd. (a), 12022.53, subds. (b), (c), (d).) To prove a personal-use firearm enhancement under section 12022.5, subdivision (a) or section 12022.53, subdivision (b), the prosecution must establish that the defendant personally used a firearm during the commission of the offense by intentionally firing the firearm, displaying it in a menacing manner, or hitting a person with it. (CALCRIM No. 3146; see also *People v. Wardell* (2008) 162 Cal.App.4th 1484, 1494; *People v. Grandy* (2006) 144 Cal.App.4th 33, 42.) To prove an intentional-discharge firearm enhancement under section 12022.53, subdivisions (c) or (d), the prosecution must establish that the defendant personally and intentionally discharged a firearm during the commission of the offense for an enhancement under subdivision (c), and that the defendant’s intentional discharge of a firearm caused death or great bodily injury for an enhancement under subdivision (d). (CALCRIM Nos. 3148, 3149; see also *People v. Lucero* (2016) 246 Cal.App.4th 750, 759-760.)

II. Substantial Evidence Supported the Attempted Murder Conviction and Firearm Enhancements

Based on the totality of the evidence presented in this case, we conclude that there was substantial evidence to support Perryman’s conviction for attempted willful, premeditated, and deliberate murder as well as the true findings on each of the firearm enhancement allegations. In particular, the evidence

was sufficient to support a finding by the jury that the shooting of Reed was not accidental, as claimed by Perryman, but rather was a premeditated and deliberate act committed by Perryman with a specific intent to kill Reed.

The jury reasonably could conclude from the evidence presented at trial that Perryman's prior altercation with Reed provided a motive for the shooting. Specifically, on the day of the shooting, Perryman and Reed had a dispute over money which resulted in Perryman physically assaulting Reed by hitting him in the face. During the altercation, Perryman also told Reed that the 71st Street residence where Reed had been staying was Perryman's "hood," and that Reed needed to leave the premises and never return. Although Reed initially left the residence, he returned multiple times that day in defiance of Perryman's command. When Reed came back to the residence again that night after Perryman repeatedly told him to never return, Perryman went outside, armed with a gun, to confront Reed.

The jury also reasonably could infer from the evidence that Perryman did not accidentally discharge his weapon during the confrontation, but rather fired his gun intentionally at Reed in a premeditated and deliberate attempt to kill him. Melchor, a neighbor who witnessed the shooting, told the police that he saw Perryman come out of the 71st Street residence and produce a handgun. Perryman fired two rounds at Reed's car and then ran down the street. In his interview with the police, Collins likewise stated that Perryman was inside the front house of the 71st Street residence when Reed pulled up in a car and yelled at Perryman to come out. After Perryman went outside to confront Reed, Collins did not hear the two men exchange any words. Collins solely heard the sound of gunfire followed by a car crash,

and then saw Perryman running from the area. Although Reed was unable to recall many details about the shooting due to the severity of his injury, he similarly testified that he was shot while inside his car and identified Perryman as the shooter.

Perryman asserts that the evidence established that Reed was the aggressor during their confrontation because Reed kept returning to the residence after being told to leave and had a weapon in his car when he came back the final time. Perryman also notes that Reed was a methamphetamine addict with multiple prior convictions and was in a stolen car at the time of the shooting. However, the fact that Reed had a machete in his car did not preclude a finding by the jury that Perryman acted with a specific intent to kill when he fired his gun at close range and one shot hit Reed in the face. The machete was found on the front passenger floorboard of the car underneath other items. No other weapon was recovered at the scene. Immediately after the shooting, Reed's car swerved down the street and then crashed into two parked vehicles. Reed was found unconscious in the driver's seat of the car with a gunshot wound to the head. The physical evidence was thus inconsistent with Perryman's claim that Reed was exiting his car with a weapon in his hand when Perryman accidentally fired his gun. Melchor's statement to the police that Perryman came outside, produced a handgun, and then fired two shots at Reed's car is likewise inconsistent with Perryman's claim that his gun accidentally discharged while in his pocket because he flinched upon seeing Reed with a weapon.

Perryman also asserts that the eyewitness testimony was insufficient to support his conviction and sentence enhancements because the witnesses gave contradictory and conflicting versions of events at trial. It is true that the civilian witnesses who

testified at trial provided statements that were inconsistent in certain respects with one another and with their prior statements to the police. It is well-established, however, that conflicts and inconsistencies in testimony, even those within the testimony of the same witness, are to be resolved by the trier of fact. (*People v. Young* (2005) 34 Cal.4th 1149, 1181 [“[r]esolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact”].) Moreover, as this court has stated, “[j]urors are the sole judges of a witness’s credibility and they are rightfully suspicious of trial testimony which deviates 180 degrees from what the witness told the police.” (*People v. Jackson* (2005) 129 Cal.App.4th 129, 167.) Here, the jury heard the eyewitness testimony presented at trial as well as the pretrial statements made by these witnesses to the police. The jury also heard evidence that the witnesses had expressed fear of retaliation for cooperating with a law enforcement investigation. Based on such evidence, the jury reasonably could have found that the witnesses’ statements to the police about the shooting were more credible and ascribed their conflicting statements at trial to their fear of testifying publicly against Perryman. It was the exclusive province of the jury to evaluate the credibility of the witnesses and the weight to be accorded their testimony.

In sum, the evidence was sufficient to support a finding that Perryman intentionally fired a gun at Reed, and did so with premeditation, deliberation, and a specific intent to kill. Perryman’s conviction for attempted murder and the firearm enhancements were supported by substantial evidence.

III. Abstract of Judgment

Although not raised by either party on appeal, there is an error in the abstract of judgment that requires correction. At the sentencing hearing and in its minute order, the trial court sentenced Perryman to an aggregate term of 77 years to life in state prison, consisting of 42 years to life on the attempted murder count pursuant to section 667, subdivision (e)(2)(A)(iii), an additional 25 years to life pursuant to section 12022.53, subd. (d), and two additional five-year terms pursuant to section 667, subdivision (a)(1). The terms imposed on the assault with a firearm count and remaining firearm enhancements were stayed. However, the abstract of judgment fails to properly reflect the total indeterminate term imposed on the attempted murder count and one of the additional five-year terms imposed under section 667, subdivision (a)(1). The abstract of judgment must be modified accordingly. (*People v. Myles* (2012) 53 Cal.4th 1181, 1222, fn. 14 [“When an abstract of judgment does not accurately reflect the trial judge’s oral pronouncement of sentence, [the appellate] court has the inherent power to correct such an error, either on [its] own motion or at the parties’ behest.”].)

DISPOSITION

The abstract of judgment is modified to reflect that the indeterminate term imposed on the attempted murder count is 42 years to life and that two additional and consecutive five-year terms were imposed under section 667, subdivision (a)(1). The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

KEENY, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.